



Neutral Citation Number: [2021] EWHC 2142 (Ch)

Case No: PT-2019-000205

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**PROPERTY TRUSTS AND PROBATE LIST (ChD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 5/8/2021

Before:

**MASTER CLARK**

Between:

**SHILL PROPERTIES LIMITED**

**Claimant**

- and -

**ANNE BUNCH**

**Defendant**

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**Samuel Hodge** (instructed by **Clarke Mairs LLP**) for the **Claimant**  
**Nigel Woodhouse** (instructed by **Simons Rodkins Solicitors LLP**) for the **Defendant**

**Hearing date: 8 July 2021**  
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**Approved Judgment**

I direct that this approved judgment, sent to the parties by email on 7 July 2021, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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**Master Clark:**

1. This is my judgment on the claimant's application dated 15 October 2019 seeking summary judgment on its claim.

**Parties and the claim**

2. The claimant, Shill Properties Limited, is an investment company. The defendant, Anne Bunch ("Mrs Bunch"), is the owner of 7 Gunstor Road, London N16 8HF ("the Property").
3. On 7 December 2018, the parties entered into a contract of sale of the Property ("the Contract") by exchanging contracts pursuant to Law Society formula B (telephone exchange).
4. The key terms of the Contract were:
  - (1) the purchase price was £840,000;
  - (2) the deposit was 5% of the price, £42,000;
  - (3) the balance was payable on completion;
  - (4) the completion date was 8 February 2019.
5. The Contract included the Standard Conditions of Sale (5<sup>th</sup> edition) ("the Standard Conditions"). These included relevantly for present purposes at clause 6 of the Special Conditions ("Clause 6"):

**"Representations**

Neither party can rely on any representations made by the other, unless made in writing by the other or his conveyancer but this does not exclude liability for fraud or recklessness."

6. By her solicitors' letter dated 7 February 2019, Mrs Bunch indicated that she was not willing to complete the Contract, alleging that it had been procured by undue influence and/or duress.
7. The claim was commenced on 12 March 2019. It seeks specific performance of the Contract and, by an amendment which is not opposed, various consequential losses.
8. The defence (dated 28 June 2019) alleged that Mrs Bunch lacked capacity to enter into it, alternatively did so under duress. These defences have now been wholly abandoned. Mrs Bunch seeks to rely on a new defence (set out in a draft amended defence) that she was induced to enter into the Contract by a misrepresentation that the claimant was a cash buyer, although no formal application to amend has been made.
9. The draft amended defence pleads that the representation that the claimant was a "cash buyer" was a representation that the claimant intended or expected to purchase the Property without the assistance of a loan or mortgage, and that that representation continued up to exchange of contracts. The representation was, it is pleaded, false, because the claimant intended to buy the Property with the assistance of finance.

**Evidence in the application**

10. Although the application notice refers to an attached witness statement, there is none on the file, or before me. The claimant's evidence comprises:

- (1) the first witness statement dated 17 April 2020 of Bernard Margulies - he is not an officer or employee of the claimant, but is the son of its director, Charles Mark Margulies; he undertook all of the negotiations with respect to the claimant's purchase of the Property – I shall refer to him as Mr Margulies;
  - (2) the witness statement dated 17 April 2020 of Charles Mark Margulies;
  - (3) the second witness statement dated 5 July 2021 of Bernard Margulies.
11. The defendant's evidence comprises:
- (1) a psychiatric report dated 17 February 2020 by Dr Neil Brener addressing Mrs Bunch's capacity
    - (i) to enter into the Contract in December 2018
    - (ii) to conduct litigation as at 10 February 2020.
  - (2) the witness statement dated 23 June 2021 of Nicola Henshall, who together with her partner, Felix Hobson, were competing prospective buyers for the Property;
  - (3) the witness statement dated 1 July 2021 of Simon Aaron, Mrs Bunch's solicitor.
12. The evidence on behalf of Mrs Bunch was served on the claimant on 1 July 2021. This was within 7 days of the hearing in accordance with CPR 24.5, although at a relatively late stage in the chronology of the application, the hearing of which was adjourned several times due to Covid restrictions, and Mrs Bunch being unable to attend remotely.

### **Factual background**

13. The circumstances in which the Contract was entered into are not entirely clear from the evidence, and are rather unusual.
14. Mrs Bunch was born on 11 December 1931 and is now 89. At the time of the material events, she was 86, turning 87 a few days after contracts were exchanged. She lives on her own. Dr Brener concludes that in December 2018, she probably had capacity to understand the information she was given about the sale of the Property, but that she was vulnerable to manipulation.
15. In mid 2018, 2 firms of estate agents were instructed (it is unclear whether by Mrs Bunch herself or someone on her behalf) to market the Property for sale: Fine & Country Limited and Alexander Knight. The claimant was introduced to the Property by Fine & Country. Mr Margulies visited the Property on 13 August 2018, and was the main point of contact between the claimant and Fine & Country, and the claimant and its conveyancing solicitors, Taylor Rose TTKW Limited ("Taylor Rose").
16. On 14 August 2018, Adam Tahir a director of Fine & Country, sent an email to Ansuya Tailor, a conveyancing executive at Cavendish Legal Group (a firm of solicitors), in the following terms:

“So, We may agree a sale for the following: 7 Gunstor Road N16 8HF. Owner is called Ann Bunch and is VERY old – her house is in a state of disrepair and she needs to move out as she can hardly get up the stairs. We have a **cash Buyer** in place at a level of £810,000.

Below is the vendors friend, who she speaks to when she needs advice.

Jacqueline Pearce

[mobile phone number and email address]

The offer hasn't been accepted as of yet but Jacqueline is going to speak to Ann and try to get the offer accepted.

Apparently Ann has not had the best experience with sols, so I have told her you are the best of the best and the sweetest thing out there

Jacqueline is going to call you tomorrow AM to discuss steps etc with you and if all good they will instruct you to go ahead.”

(emphasis added)

17. It would appear that Mrs Bunch accepted the offer of £810,000, although there is no evidence as to how this occurred. On 15 August 2018, Mr Tahir sent a memorandum of sale at the price of £810,000 to the claimant and Taylor Rose. On 29 August 2018, Ms Tailor sent a contract pack to Taylor Rose.
18. In the meantime, on 11 September 2018, Ms Henshall and Mr Hobson, who had been introduced by Alexander Knight, offered £860,000 for the property.
19. On 18 September 2018, Taylor Rose (Mehreen Iqbal) raised a number of enquiries on the Contract and the Property. Ms Tailor responded to those enquiries the following day.
20. On 21 September 2018, Alexander Knight wrote to Ms Henshall and Mrs Bunch confirming that Mrs Bunch had accepted their offer of £860,000; and on 8 October 2018, Ms Henshall's solicitors confirmed that she and Mr Hobson had received their mortgage offer.
21. On 10 October 2018, Ms Tailor emailed Ms Iqbal to tell her that Mrs Bunch was no longer proceeding with the sale to the claimant. Mr Margulies' response was to email the partner at Taylor Rose, Sean McCarthy "Please take over here". There is no evidence as to what Mr Margulies expected Mr McCarthy to do, nor as to what Mr McCarthy in fact did.
22. He must, however, have taken some steps, because on 7 November 2018, Ms Iqbal emailed Ms Tailor:

“I write further in this matter as I understand this matter is no[w] proceeding.

Please confirm that you client is happy to proceed with the purchase price of £820,000 with immediate exchange.”

23. Mr Margulies' witness statement does not contain any explanation of his involvement in the increased offer, how it came about, how it was communicated to Mrs Bunch or how she accepted it. However, on 7 November 2018 Ms Henshall emailed her solicitors, saying:

“I had a call from the seller this morning telling me that two days ago she had been persuaded by another agent to sell the house to a **cash buyer** and she instructed her solicitor accordingly, but now she has changed her mind. Based on my discussions with her and the estate agent we are dealing with, I think that she is just very muddled and misremembering things that happened before she accepted our offer. However, I would appreciate if you could just confirm with her solicitors that everything is ok and they have not been instructed to prepare contracts for another buyer.”

(emphasis added)

24. On 8 November 2018, Ms Henshall’s solicitors confirmed that they were ready to exchange straightaway.
25. On 9 November 2018, Cavendish Legal (Nick Pelmont, a partner) emailed Ms Henshall’s solicitors in response to their query:

“There is no contracts race at the moment.

We withdrew the contract from the first buyers and your buyers are the only ones currently with a contract. At the moment we are at least 2 weeks away from being in a position to exchange as we are not ready to exchange on Anne’s related purchase.”

26. Ms Henshall’s solicitors replied

“Can you expressly confirm that you are not instructed to proceed with any other buyer?”

to which the reply from Mr Pelmont was

“Yes, at present that is the case.”

This would appear to be a straightforward untruth in the light of Ms Iqbal’s email of 7 November 2018 to Ms Tailor. There is no explanation in the evidence as to how Mr Pelmont considered himself able to write in these terms. Mrs Bunch’s solicitors have attempted to obtain a statement from Mr Pelmont, but have been told that he is on long term stress leave.

27. Just under 3 weeks later, on 29 November 2021, in circumstances that are completely unexplained, Mr Pelmont and Ms Tailor attended Mrs Bunch at the Property. Mr Pelmont’s attendance note of that date records:

“Given Anne’s potential vulnerability, I decided personally attend Anne’s house with Ansuya to make sure Anne was fully aware of what she was doing and also to ensure that there had been no duress from either agent. AK had a keen buyer at a slightly higher price and I talked through the pros and cons of the 2 buyers with Anne to make sure she made the correct choice. Her preference was to go with Fine & Country’s buyer and I discussed with Anne that I would try to get that

buyer to come up in price by £20K so that it would be almost on a par with the A.K. buyer.

After over an hour meeting with Anne she was very happy to sign the sale and purchase contracts.

I could see when I visited Gunstor Road that it was in a very poor state of repair and extremely cluttered, Anne was sleeping in a corner of the living room downstairs and rarely going up to the second floor.”

28. The draft of the Contract when signed by Mrs Bunch provided for the price of £820,000. Thus, on 29 November 2018, Mrs Bunch decided to sell and signed a document in which she agreed to sell the Property to the claimant for £40,000 less than the sum offered by Ms Henshall, and with a deposit half that of Ms Henshall, in circumstances where Ms Henshall was and had for some time been ready to exchange contracts immediately.
29. Mr Pelmont did succeed in persuading the claimant to pay £20,000 more. On 5 December 2018, Mr McCarthy of Taylor Rose emailed Ms Iqbal and Ms Tailor:  

“I am instructed that the following has been agreed:

  1. Purchase price of £840,000
  2. Exchange on a 5% deposit to be released as agent
  3. Completion to take place at the end of March 2019.”
30. Contracts were exchanged by telephone 2 days later, on 7 December 2018, with the price amended in manuscript to £840,000, and a completion date of 8 February 2019. On the same day, Ms Henshall made an increased offer of £870,000 by an email sent at 11.42am. Curiously, that is precisely the same time that contracts were exchanged by Mr Pelmont and Ms Tailor.
31. Following exchange, the claimant sought access to the Property for a valuation, in order to obtain mortgage finance. Mrs Bunch refused this. On 7 February 2019, Stirling Ackroyd, newly instructed by Mrs Bunch, wrote asserting that the Contract was void as having been entered into under duress and undue influence.

### **Summary judgment – the legal principles**

32. CPR 24.2 provides, so far as relevant:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

...

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

33. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v*

*Opal Telecom Limited* [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including *AC Ward & Sons v Catlin (Five) Limited* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477. It is unnecessary to set them out here. The burden of proof is on the applicant to show that the conditions in CPR 24.2 are satisfied.

### **Issues in the application**

34. The issues in the application are:

- (1) whether Mrs Bunch is entitled to rely upon the defence raised in her draft amended defence in the absence of a formal application to amend;
- (2) if so, whether that defence has no real prospect of success:
  - (i) whether Mrs Bunch is “contractually estopped” from raising it;
  - (ii) whether there is no real prospect of her establishing the factual basis of the defence.

*Whether Mrs Bunch is entitled to rely upon the defence in her draft amended defence*

35. As to this, the position is set out in the recent Court of Appeal decision of *Bhamani v Sattar* [2021] EWCA Civ 243 (to which neither counsel referred me). At [60] and [61], Nugee LJ (with whom the other judges agreed) made the following observations:

- (1) CPR 24.2 itself does not prescribe what the judge can and cannot look at for the purpose of evaluating whether the defence has a real prospect of success;
- (2) the rules permit an application for summary judgment to be made before a defence is pleaded;
- (3) if a claimant applies for summary judgment before the defendant has filed a defence, the rules also provide that the defendant need not file a defence before the hearing;
- (4) in such a case, the defendant will in practice, need to explain what their proposed defence is, and give evidence in support of it;
- (5) although the overall burden of establishing that there is no real prospect of success lies on the claimant, once the claimant adduces credible evidence in support of the application, the evidential burden will shift to the defendant of adducing evidence to rebut this, although the standard of proof is not high and that it suffices to show some real prospect of success;
- (6) the longstanding practice under Part 24 of the CPR (as it was under RSC Order 14) is therefore, for the defendant to adduce sufficient evidence to show a genuinely triable issue, and this needs to be done, and routinely is, whether or not a defence has already been served.

36. Nugee LJ continues:

“62. In other words, the assessment that the judge undertakes under Part 24 is one of assessing the evidence, not the pleadings. The question is not whether the pleaded defence has a prospect of succeeding, but whether the defendant has no real prospect of successfully defending the claim. What then is a judge to do if the defendant's evidence appears sufficient to raise a triable issue, but the defendant has served a defence in which the relevant defence has not yet been pleaded? Unless the judge can rule out any possibility of amendment (which would be unusual) I see nothing wrong in the judge concluding that the defendant had some real prospect of success even though this would require the defendant to amend.

...

64. Mr Roseman objected that the new argument was advanced at a very late stage and that the Judge should have required the Defendants to properly formulate an amendment to the Defence and make a formal application to amend, adjourning if necessary for that purpose. In some cases that might indeed be an appropriate way to deal with a proposed defence that emerges at a late stage in the application and has not yet been pleaded; experience shows that it is often easier to judge the soundness of a proposed defence if it is properly formulated. But once it is appreciated that the question under CPR 24.2 is not the state of the pleadings but the position on the evidence, I do not see that it is always required.
65. Mr Roseman referred us to *Magdeev v Tsvetkov* [2019] EWCA Civ 1802 at [27] per Sir Geoffrey Vos C where he said that there were a number of reasons why the Court responds formally to formal applications to amend. But that was not said in the context of an application under Part 24, but in the context of an amendment that had been floated, but not formally applied for, to add new heads of loss. The judge had been persuaded to rule on whether such an amendment would be permissible without the application for an amendment actually having been made, and it was that that Vos C said was unsatisfactory. I do not think it has any direct application to the position under Part 24.
66. In my judgment the Judge was entitled to conclude that the fact that the Defendants had neither pleaded their proposed defence, nor yet applied to amend, did not prevent him from assessing that they had a real prospect of success in such a defence.”
37. This decision is in my judgment sufficient to dispose of the arguments of the claimant’s counsel, based on *Magdeev* and the decision of Chief Master Marsh in *Folgender Holdings Limited v Letraz Properties Limited* [2091] EWHC 2131 (Ch), that Mrs Bunch should not be permitted to raise her new defence in the absence of amendment.
38. Following the hearing, I drew both counsels’ attention to *Bhamani* and gave them an opportunity to make written submissions on it. The claimant’s counsel sought to distinguish *Bhamani* on the grounds that the factual matters on which the defendant was permitted to rely were set out in his original defence before the proposed amendment. He submitted that the lateness of the new misrepresentation defence should preclude Mrs Bunch from being permitted to rely upon.
39. I do not accept this argument. As noted above, Mrs Bunch’s evidence was served in accordance with the rules. The claimant did not oppose and had no grounds for opposing its admission. *Bhamani* establishes that the court is entitled to look at the evidence irrespective of the state of the pleadings. In this context, it is to be remembered that granting summary judgment deprives the defendant of a trial, and should not be granted unless the court is satisfied that the defendant has no real prospect of success, having considered all the material before it. The evidence being properly before the court, it would be wrong in principle to disregard it.



*Whether Mrs Bunch has a real prospect of success in her misrepresentation defence*  
*Contractual estoppel*

40. The claimant's counsel submitted that Mrs Bunch is precluded by Clause 6 from alleging that she was induced to enter into the Contract by misrepresentation. He referred to and relied upon *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), in which the relevant clause provided:

“This Agreement constitutes the entire agreement between the parties hereto and the Tenant acknowledges that it is entering into this Agreement on the basis of the terms hereof and not in reliance upon any representation or warranty whatsoever whether written or oral expressed or implied made by or on behalf of [the defendant] (save for written replies given by [the defendant's] solicitors to the enquiries raised by the Tenant's solicitors.”

41. I accept of course that the claimant would be entitled to seek to rely on Clause 6 in its reply to the amended defence. If it did so, then the following issues could be raised by Mrs Bunch in response:

- (1) whether Clause 6 extends to misrepresentations that induced Mrs Bunch to enter into the Contract;
- (2) whether the misrepresentation was made fraudulently or recklessly so that it falls outside Clause 6;
- (3) whether Clause 6 satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977 – the burden of proof being on the claimant: see s.3 Misrepresentation Act 1967.

Scope and meaning of Clause 6

42. As Lewison J said in *FoodCo* (at [166]), precisely what statements are covered by a non-reliance clause is a question of construction of the clause. The claimant's counsel submitted that the clause in *FoodCo* was materially identical to Clause 6. I do not accept that Mrs Bunch has no real prospect of showing the contrary. The clause in *FoodCo* contained an express acknowledgement that the Tenant was not entering into the agreement in reliance on any representations. Clause 6 does not contain such a provision. There is a distinction in principle between a representation which it is agreed may not be relied upon as governing the parties' relationship over and above the express contractual terms, and a representation which has induced a party to enter into a contract. It is at least arguable that Clause 6 on its proper construction is confined to the former.

Whether the misrepresentation was made recklessly or fraudulently

43. The claimant's counsel submitted that since Mrs Bunch's counsel has

- (1) admitted the terms of the Contract; and
- (2) in the proposed amended defence, has not pleaded that the representation was fraudulent or reckless,

he has effectively accepted that Clause 6 applies. I disagree. Admission of the terms of the Contract is not the same as admitting that Clause 6 applies to the misrepresentation alleged. If the claimant relies on Clause 6 in its reply, that will be the point in the statements of case for Mrs Bunch to allege (by way of rejoinder) that the misrepresentation was made fraudulently or recklessly. In addition, since the representation alleged is as to the claimant's intentions or expectations, its nature is

such that the claimant must have known or been reckless as to its truth. It cannot in my judgment be concluded that Mrs Bunch has no real prospect of showing this.

Whether Clause 6 satisfies the reasonableness test

44. The claimant's counsel submitted that Clause 6 plainly satisfied the reasonableness test, referring me to *FoodCo* at [177] and to *Lloyd v Browning* [2013] EWCA Civ 1637, in which the relevant clause also expressly provided that, in making the contract, no statement by the seller or his agent had induced the buyer to enter into it.
45. As to this, whether a contractual term is "fair and reasonable" is a fact sensitive, multi-factorial issue, which in my judgment is unsuitable for summary judgment. For present purposes, it is sufficient to refer to para 1.059 of *Emmet & Farrand on Title*, where after discussing the decision of *Morgan v Pooley* [2010] EWHC 2447 (in which a non-reliance clause was upheld), the authors continue:

"However, it should be borne in mind that the merits may matter: reliance on a very similar provision in respect of a misrepresentation was disallowed as not fair and reasonable in the particular circumstances of the case (a contract race) by Mr J.A.D. Gilliland QC, sitting as a deputy judge in *Goff v Gauthier* (1991) 62 P. & C.R. 388 (see §2.025); see similarly in *Inntrepreneur Estates (CPC) Ltd v Worth* [1996] 11 E.G. 136. Neither of these decisions was cited in *Foodco UK LLP & Others v Henry Boot Developments Ltd* but both were considered in *Cleaver v Schyde Investments Ltd* [2011] EWCA Civ 929, where the first instance judge's view of the merits prevailed."

*Factual basis of the misrepresentation claim*

46. The claimant's counsel also relied upon the evidence of Mr Margulies that he did not necessarily represent that the claimant was a cash buyer. This is, however, a question of fact, and I cannot assume at this stage that Mr Margulies' evidence will withstand cross-examination.
47. Mr Tahir's email of 14 August 2018 states that the claimant is a cash buyer, and Mrs Bunch has a real prospect of showing that the claimant was the source of that statement, even if indirectly. Secondly, it is clear from Ms Henshall's email of 7 November 2018 (set out at para 23 above) that Mrs Bunch had been told that the claimant was a cash buyer. Thirdly, Mr Pelmont's attendance note of 29 November 2018 records going through the "pros and cons" of the two buyers. As already noted, that Ms Henshall had her mortgage offer, was ready to exchange, had agreed a price which at that time was £40,000 more than the claimant was offering, and to pay a 10% deposit. In addition, Mrs Bunch had formed a friendly relationship with Ms Henshall (phoning her up on several occasions). It is difficult to see what the pros of the claimant were other than being a cash buyer.
48. I note that Mrs Bunch herself has not made a witness statement. Dr Brener's report includes the results of the Addenbrooke's Cognitive Evaluation (ACE III) administered to Mrs Bunch on 26 June 2019. She had a low memory score (15 out of 26), as was her verbal fluency score (6 out of 15). Her overall score was 79 out of 100, which indicates likely dementia, but not profound or very significant dementia. There is no more recent evaluation of Mrs Bunch before me. Dr Brener concludes that her failing memory will probably gradually deteriorate. There may be limitations in Mrs Bunch's recollection

of the material events, but this is not an insuperable obstacle to her defence. This does not however, prevent her defence from being established in other ways, including the evidence of other witnesses and documentary evidence.

49. In this context, I bear in mind that disclosure may produce documents relevant to the issues in this claim. Mr Margulies has exhibited some correspondence between himself and Taylor Rose, and between Taylor Rose and Cavendish Legal. The claimant has not however disclosed Taylor Rose's full conveyancing file, nor any communications between Taylor Rose and Fine & Country (other than 2 WhatsApp messages arranging a viewing on 13 August 2018 and access for a builder on 13 September 2018).
50. Similarly, although Cavendish Legal have been asked to disclose their file, this would seem to be incomplete, and does not include all its correspondence with Taylor Rose or with Fine & Country. The claimant's counsel criticised Mrs Bunch and her solicitors for not seeking orders for disclosure, but I do not consider that criticism well-founded in a summary judgment application. If disclosure is necessary for the court to fairly determine the claim, then it is unsuitable for summary judgment.

### **Conclusion**

51. For the reasons set out above therefore, the claimant has not satisfied me that Mrs Bunch has no real prospect of defending this claim, and I dismiss the application.